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Ichi-Ban Plastic (M) Sdn Bhd v Tenaga Nasional Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(NCVC)(W)-695–03 OF 2013
ZAHARAH IBRAHIM, MOHAMAD ARIFF AND MAH WENG KWAI JJCA
7 JULY 2014

Evidence — Burden of proof — Allegation of particular fact — Electricity supplier (TNB) claimed for loss of revenue against consumer on ground of meter tampering — Whether manner in which case pleaded required TNB to prove on balance of probabilities that consumer tampered with meter — Whether TNB could not claim for loss of revenue under s 38(3) of the Electricity Supply Act 1990 simply on basis consumer had been unjustly enriched by using unrecorded electricity without proving consumer tampered with meter — Whether TNB failed to show credible evidence how amount claimed as loss of revenue derived

The respondent ('TNB') sued the appellant ('Ichi-Ban') in the High Court for RM1,065,318.73 as loss of revenue it had allegedly suffered as a result of meter tampering. The claim was based on s 38(3) of the Electricity Supply Act 1990 ('ESA') under which a consumer was required to pay TNB for its loss of revenue if an offence under s 37(1), (3) and (14) of the ESA had been committed. In its pleadings, TNB stated that an inspection by its personnel at Ichi-Ban's premises showed the meter had been 'tampered with' and did not record the correct usage of electricity. According to TNB's estimation, RM1,065,318.73 was the amount of revenue it had lost. Section 38(4) and (5) of the ESA provided that a duly certified written notice by TNB of the amount of revenue lost was prima facie evidence of the sum the consumer had to pay under s 38(3). A year after it was inspected, the meter was taken from Ichi-Ban's premises to a TNB substation where a 'miswiring' within the meter was discovered. It was not disputed that the 'miswiring' was done by TNB itself. The High Court allowed TNB's claim, holding that, inter alia, a prosecution or conviction of the consumer under s 37 was not a pre-requisite before a claim for loss of revenue under s 38(3) could be filed as s 38(3) was not premised on whether a consumer was found guilty of tampering with the meter but was based simply on the principle a consumer should not be unjustly enriched by not paying for use of unrecorded electricity. With regard to the sum claimed by TNB, the High Court held that under s 38(4) of the ESA, TNB's statutory notice to Ichi-Ban was prima facie evidence that that sum was payable unless Ichi-Ban could rebut that presumption by acceptable evidence. The trial judge accepted TNB's method of calculating the loss of revenue based on 'averaging' as opposed to 'percentage of error'. The judge also held the issue of meter tampering was a separate matter from the issue of 'miswiring'. In the instant appeal, Ichi-Ban

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contended that based on TNB's pleadings, it had failed to prove Ichi-Ban had committed the alleged meter tampering and that the sum TNB claimed had also not been proven because the evidence showed estimations and guess-work were used to determine that amount.

Held, allowing the appeal and setting aside the High Court's decision:

(1) On balance of probabilities, TNB failed to prove the alleged offence of meter tampering by Ichi-Ban. The probabilities did not show tampering by Ichi-Ban, or any other person for that matter. The evidence provided by TNB was too uncertain and inconclusive. The ultimate burden rested on TNB to prove liability and, if liability was established, to prove the quantum of the loss of revenue. The ESA provisions were an aid to TNB to prove both those elements but ultimately the success or failure of TNB's claim rested on the state of its pleadings and the quality of its evidence. There were serious shortcomings in the quality of evidence produced by TNB at the trial (see paras 17, 34 & 36).

(2) The court could not agree with the broad and unqualified proposition that irrespective of how the case was pleaded, a s 38 claim could be supported as being premised on the principle of unjust enrichment simpliciter and that there was no requirement to prove mens rea in all situations falling under a s 38 claim. The statutory context made it clear that there had to be 'evidence' that some 'offence' had been 'committed' (see paras 17 & 33).

(3) There was a non-direction and misdirection by the trial judge on the facts and the law. There was no proper assessment of the pleadings and the evidence. In particular, the High Court gave insufficient attention to the fact of 'miswiring'. It was accepted that the 'miswiring' was done by TNB itself. It was crucial to determine when the 'miswiring' happened — was it before or after the meter was moved from Ichi-Ban's premises to the TNB substation? Even TNB's witnesses were unsure. The evidence was not overwhelmingly in TNB's favour and it could not prove on balance of probabilities that the 'miswiring' occurred after the detection of the alleged tampering, ie after the meter had been moved to the TNB substation. The High Court also failed to appreciate the critical significance of this issue when it described the 'miswiring' and the tampering issues as two different issues (see paras 17 & 33).

(4) On the question of damages, the court found Ichi-Ban had succeeded in rebutting the prima facie presumption of loss of revenue. The court found it difficult to support the calculation done by TNB's witness, PW2, on the basis of an 'average' and with regard to the basis periods chosen by her. The court agreed with Ichi-Ban's submission that the 'averaging' was more on the basis of a 'guess' (see para 35).

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(5) There was no legal requirement for there to be a prior prosecution and conviction under s 37 of the ESA before a claim for loss of revenue was brought under s 38(3) (see paras 14 & 17).

[Bahasa Malaysia summary

Responden ('TNB) menyaman perayu ('Ichi-Ban') di Mahkamah Tinggi untuk RM1,065,318.73 sebagai kerugian hasil yang didakwa dialami akibat daripada usikan meter. Tuntutan itu adalah berdasarkan kepada s 38(3) Akta Bekalan Elektrik 1990 ('ABE') yang mana pengguna dikehendaki membayar TNB untuk kerugian hasil jika suatu kesalahan di bawah s 37(1), (3) dan (14) daripada ABE yang telah dilakukan. Di dalam pliding, TNB menyatakan bahawa pemeriksaan oleh kakitangan di premis Ichi-Ban menunjukkan meter itu telah 'tampered with' dan tidak merekodkan penggunaan elektrik yang betul. Menurut anggaran TNB, RM1,065,318.73 adalah jumlah kerugian hasil yang ditanggung. Seksyen 38(4) dan (5) ABE dengan syarat suatu notis bertulis yang diperakui dengan sewajarnya oleh TNB daripada jumlah hasil yang rugi adalah bukti prima facie mengenai jumlah pengguna yang terpaksa membayar di bawah s 38(3). Setahun selepas diperiksa, meter itu telah diambil dari premis Ichi-Ban ke pencawang TNB yang mana 'miswiring' didapati dalam meter. Adalah tidak dipertikaikan bahawa 'miswiring' telah dilakukan oleh TNB sendiri. Mahkamah Tinggi membenarkan tuntutan TNB, memutuskan bahawa, antara lain, pendakwaan atau sabitan pengguna di bawah s 37 adalah bukan prasyarat sebelum suatu tuntutan bagi kerugian hasil di bawah s 38(3) boleh difailkan kerana s 38(3) bukan berdasarkan sama ada pengguna yang didapati bersalah mengusik meter tetapi hanya berdasarkan kepada prinsip pengguna tidak boleh dengan tidak adil diperkaya dengan tidak membayar bagi penggunaan elektrik tanpa rekod. Berhubung dengan jumlah wang yang dituntut oleh TNB, Mahkamah Tinggi memutuskan di bawah s 38(4) ABE, notis berkanun TNB untuk Ichi-Ban adalah prima facie bahawa jumlah wang itu kena dibayar melainkan jika Ichi-Ban boleh mematahkan anggapan dengan keterangan munasabah. Hakim perbicaraan menerima kaedah pengiraan kerugian hasil TNB berdasarkan 'averaging' berbanding dengan 'percentage of error'. Hakim juga memutuskan isu usikan meter yang merupakan perkara yang berasingan daripada isu 'miswiring'. Dalam rayuan ini, Ichi-Ban menegaskan bahawa berdasarkan pliding TNB, ia gagal membuktikan Ichi-Ban telah melakukan usikan meter yang dikatakan dan bahawa jumlah yang didakwa oleh TNB juga tidak terbukti kerana keterangan menunjukkan anggaran dan tekaan digunakan untuk menentukan jumlah itu.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Atas imbangan kebarangkalian, TNB gagal membuktikan kesalahan yang dikatakan pengusikan meter oleh Ichi-Ban. Kebarangkalian tidak menunjukkan usikan oleh Ichi-Ban, atau mana-mana orang lain untuk

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perkara itu. Keterangan yang dikemukakan oleh TNB adalah terlalu samar-samar dan tidak meyakinkan. Beban utama terletak atas TNB untuk membuktikan liabiliti dan, jika liabiliti telah diwujudkan, untuk membuktikan kuantum kerugian hasil. Peruntukan ABE adalah bantuan kepada TNB untuk membuktikan kedua-dua elemen-elemen tetapi akhirnya kejayaan atau kegagalan tuntutan TNB terletak pada keadaan pliding dan kualiti keterangan. Terdapat kekurangan yang serius dalam kualiti keterangan yang dikemukakan oleh TNB pada perbicaraan itu (lihat perenggan 17, 34 & 36).

(2) Mahkamah tidak boleh bersetuju dengan cadangan yang terlalu umum dan tidak bersyarat bahawa tidak kira bagaimana kes itu diplidkan, suatu tuntutan s 38 boleh disokong seperti yang berlandaskan prinsip pengkayaan tak adil *simpliciter* dan bahawa tidak ada keperluan untuk membuktikan mens rea di semua keadaan yang termasuk di bawah tuntutan s 38. Konteks berkanun menyatakan dengan jelas bahawa harus ada 'evidence' bahawa beberapa 'offence' telah 'committed' (lihat perenggan 17 & 33).

(3) Terdapat tiada arah dan salah arah oleh hakim perbicaraan mengenai fakta dan undang-undang. Tiada penilaian yang sepatutnya bagi pliding dan bukti. Khususnya, Mahkamah Tinggi telah memberikan perhatian yang tidak mencukupi kepada hakikat 'miswiring'. Ia telah diterima bahawa 'miswiring' telah dilakukan oleh TNB sendiri. Adalah penting untuk menentukan apabila 'miswiring' berlaku — ia adalah sebelum atau selepas meter itu dipindahkan daripada premis Ichi-Ban untuk pencawang TNB itu? Saksi TNB juga tidak pasti. Keterangan adalah terlalu tidak memihak TNB dan ia tidak boleh membuktikan atas imbangan kebarangkalian bahawa 'miswiring' berlaku selepas pengesanan usikan yang dikatakan itu, iaitu selepas meter itu telah berpindah ke pencawang TNB. Mahkamah Tinggi juga gagal menilai kepentingan kritikal isu apabila menyifatkan 'miswiring' dan isu-isu usikan adalah dua isu yang berbeza (lihat perenggan 17 & 33).

(4) Dalam soal ganti rugi, mahkamah mendapati Ichi-Ban telah berjaya mematahkan anggapan prima facie mengenai kerugian hasil. Mahkamah mendapati sukar untuk menyokong pengiraan yang dilakukan oleh saksi TNB, PW2, atas dasar yang 'average' dan berkenaan dengan tempoh asas yang dipilih olehnya. Mahkamah bersetuju dengan penghujahan Ichi-Ban bahawa 'averaging' lebih kepada dasar satu 'guess' (lihat perenggan 35).

(5) Tidak ada keperluan undang-undang untuk menimbulkan sesuatu pendakwaan dan sabitan terdahulu di bawah s 37 ABE sebelum suatu tuntutan bagi kerugian hasil telah diperuntukkan di bawah s 38 (3) (lihat perenggan 14 & 17).]

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Notes

For cases on allegation of particular fact, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) 488–495.

Cases referred to

Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd [2007] 1 MLJ 217; [2006] 4 CLJ 892, CA (refd)

JW Stupple v Royal Insurance Co Ltd [1970] 3 All ER 230, CA (refd)

R v London Borough of Haverling [2002] EWCA Crim 2558, CA (refd)

Sumbang Projeks Sdn Bhd v Tenaga Nasional Bhd [2014] 4 CLJ 323, CA (refd)

Tenaga Nasional Bhd v Ee-Lian Plastic Industries (M) Sdn Bhd [2013] 8 MLJ 683; [2013] 2 CLJ 697, HC (not folld)

Tenaga Nasional Bhd v Takatronics (M) Sdn Bhd [2010] MLJU 1727; [2010] 1 LNS 1559, HC (not folld)

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296, FC (folld)

Legislation referred to

Electricity Supply Act 1990 ss 37, 37(1), (3), (14), 38, 38(1), (3), (4), (4)(b), (5)

Appeal from: Civil No 22NCVC-421 of 2011 (High Court, Pulau Pinang)

Gideon Tan (YJ Yap with him) (Gideon Tan Razali Zaini) for the appellant.
Fathima bt Idris (Idris & Assoc) for the respondent.

Mohamad Ariff JCA (delivering judgment of the court):

[1] This was an appeal against the decision of the High Court in Penang which allowed the claim by the respondent/plaintiff ('TNB') against the appellant/defendant ('Ichi-Ban') for the sum of RM1,065,318.73 with costs, for loss of revenue resulting from meter tampering. This was a claim based on s 38 of the Electricity Supply Act 1990 ('ESA'), in particular s 38(3) which reads:

> (3) The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under section 37(1), 37(3) and 37(14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.

[2] The legal ingredients of liability under s 38 are clear. TNB (the licensee) may require Ichi-Ban ('the consumer') to pay TNB for the 'loss of revenue due to the offence committed' under the subsections specified, ie s 37(1), (3) and (14) of the ESA.

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THE PLAINTIFF'S PLEADED CASE

[3] On the pleaded case, TNB had based its claim on an alleged tampering of the meter, meaning to say, the claim was latched onto an alleged commission of an offence under s 37(1), (3) and (14) reading:

> (1) Any person who tampers with or adjusts any installation or part thereof or manufactures or imports or sells any equipment so as to cause or to be likely to cause danger to human life or lirnb or injury to any equipment or other property shall be guilty of an offence and for each such offence shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.
>
> (3) Any person who in any manner dishonestly:
>
> (a) abstracts electricity;
>
> (b) consumes electricity;
>
> (c) uses electricity;
>
> (d) alters the index of any meter or other instrument used on or in connection with any installation of any supply authority or any licensed installation for recording the output or consumption of electricity; or
>
> (e) prevents any such meter or instrument from duly recording the output or consumption of electricity,
>
> shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding three years or both.
>
> (14) Any person who damages any meter or other instrument used on or in connection with any licensed installation for recording the output or consumption of electricity shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years or to both.
>
> (Emphasis added.)

[4] The pleaded case of TNB referred to a 'pengusikan pada pepasangan meter/meter'. See paras 6 and 7 of the statement of claim:

> 6 ... pada 21 September 2010, Plaintif melalui agen/pengkhidmatnya telah melakukan pemeriksaan ke atas pepasangan meter/meter di premis Defendan dalam kehadiran wakil/pekerja Defendan.
>
> 7 Hasil pemeriksaan tersebut, Plaintif mendapati bahawa terdapat pengusikan pada pepasangan meter/meter seperti berikut:
>
> (i) kunci mangga meter cage telah dibuka menggunakan master key atau pendua;

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(ii) paparan meter tidak menunjukkan bacaan arus sebenar bagi fasa merah sebenar kerana nilainya tidak sama dengan nilai yang diambil pada busbar;

(iii) sil pada TTB adalah palsu setelah membuat perbandingan dengan sil yang asal; dan

(iv) link S1 dan S2 bagi fasa merah pada TTB telah dilintarpintaskan dan menyebabkan meter tidak merekodkan bacaan arus sebenar.

THE MATERIAL FACTS

[5] An inspection conducted by TNB on the metering equipment located on Ichi-Ban's premises on 21 September 2010, and in the presence of Ichi-Ban's representatives, indicated an alleged tampering of the metering installation. The meter cage which was locked could only be forcibly opened by cutting the padlock. The inspection indicated an error of reading resulting from the tampering of –36.11%. TNB thereafter recalculated the usage of electricity and came to an unrecorded figure of RM1,065,318.73 from December 2006 to September 2010. The statutory statement under s 38(4) and (5) of the ESA dated 19 October 2010 was then served on Ichi-Ban, which offered to settle the underbilling for RM200,000. Section 38(4) and (5), which are commonly referred to in cases of this nature by TNB, read:

> (4) A written statement by an employee of the licensee duly certified by the licensee or any person authorised by the licensee specifying:
>
> (a) The amount of loss of revenue or the expenses incurred by the licensee; and
>
> (b) The person liable for the payment thereof, shall be prima facie evidence of the payment that has to be made by the consumer under subsection (3).
>
> (5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in a court.

[6] The meter was moved subsequently from Ichi-Ban's premises to a TNB substation nearby. No accuracy test was conducted at that time. A miswiring was discovered only on 13 September 2011. It was not in dispute, and this was expressly accepted by the High Court in its judgment, that the miswiring/mistake was done by TNB itself. This issue of miswiring has been noted earlier above when para 6 of the statement of claim was referred to. TNB itself had pleaded '(iv) link S1 dan S2 bagi fasa merah pada TTB telah dilintarpintaskan dan menyebabkan meter tidak merekodkan bacaan arus sebenar'.

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THE HIGH COURT DECISION

[7] The learned trial judge allowed TNB's claim on both issues of liability and the calculation of damages payable. On the issue of liability, the learned judge applied the line of cases which decided that liability based on s 38 was not dependent on any prosecution being instituted against the customer under s 37. The High Court applied the decisions in *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd* [2007] 1 MLJ 217; [2006] 4 CLJ 892 and *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296. The High Court held, inter alia, that s 38(1) 'was enacted specifically for the preservation of TNB's interest' and 'empowers TNB to act expeditiously to prevent misuse such as theft of electricity'. See the following findings at paras 16 to 20 of the judgment:

> (16) Accordingly, there is no requirement for a customer to be charged or convicted under s 37 first before a claim be made by TNB for the loss of revenue.
>
> (17) Under s 38(3) the duty to pay for the loss of revenue is on the consumer not the convicted. Prosecution or conviction under s 37(10) or (13) or (14) is not a prerequisite before a claim under s 38(3) can be instituted.
>
> (18) The rationale is that a consumer should pay for the loss of revenue, is because the consumer is the one who has derived the benefit from the unrecorded electricity usage. This subsection is premised on the principle of unjust enrichment.
>
> (19) Hence, there is no requirement to establish that the defendant was the one who interfered with the metering equipment. All the subsections indicate is that the defendant was the one who had derived benefit and enrichment from the situation.
>
> (20) Section 37 deals with an offender who tampers with the meter. A consumer is not necessarily the offender. A consumer may be innocent of the tampering act but if a consumer benefitted from the tampering he had to pay for the underbilling.

See also para 23:

> Hence, the defendant's apprehension that 'once the plaintiffs civil claim is allowed, the defendant is effectively found to have committed a criminal offence' is unfounded. Section 38 is only concerned with the state of affairs (ie facts amounting to the commission of a crime) and is not concerned with the perpetrator or the offender; other sections in the Act deal with this.

[8] On the issues of proof and quantum of damages claimed by TNB, the learned judge dismissed the argument that TNB had the burden to prove special damages on the facts. The learned judge preferred to accept the

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argument that here the claim was not brought on the basis of contract or tort, but was statutory in character, ie it was a claim for loss of revenue under s 38(4) of the ESA. Quoting, inter alia, *Halsbury's Laws of England*, the court found the claim here to be one for 'compensation provided by statute' which should be distinguished from a claim for 'damages'. Under the ESA, the burden lay on Ichi-Ban to rebut TNB's claim in view of the wording of s 38(4) whereby 'a written statement by an employee of the licensee duly certified by the licensee ... specifying ... the amount of loss of revenue or the expenses incurred by the licensee ... shall be prima facie evidence of the payment that has to be made by the consumer ...'

[9] The learned trial judge found that the Legislature had taken cognisance of the fact that in a claim under s 38(3) 'the plaintiff has to work very much in the dark to figure out the loss as all particulars of the actual and real usage of the electricity is with the defendant', and as such the measure of the loss given by the plaintiff becomes a prima facie evidence and it was for the defendant to rebut that evidence with 'acceptable evidence'. The court held that Ichi-Ban as defendant had failed to discharge this burden when it failed to produce the production records and purchase orders, as well as its audited accounts.

[10] The learned judge also held that TNB's method of calculation of the loss based on 'average', as opposed to 'percentage of error', was correct. The method of calculation as elaborated in court by PW2 (Siti Tafizah bt Tajuldin) was approved. See para 52 of the judgment:

> 52 The defendant's contention that the calculation of the loss ought to be based on the percentage of error is not correct. PW2 had told the court that the method used was based on average is because the error was completed using a stopwatch (Q & A number 5 of exh P4), where is the evidence by the defendant that this method is wrong.

See further para 55:

> 55 The defendant claims that PW2 did not take into account public holidays. The defendant is asking the plaintiff to make the assumption that they were not working on public holidays, which they have shown no evidence of this. It is for the defendant to show evidence whether they were operating on public holidays et cetera. It is not for the plaintiff to make assumption on this. The onus is on the defendant to adduce acceptable evidence to contradict the prima facie evidence of the plaintiff and mere suggestions in cross examination alone would not suffice. This is in line with section 106 of the Evidence Act.

[11] The learned judge held, given the circumstances of the case, TNB's conclusion was a reasonable one and had not been contradicted by Ichi-Ban with acceptable evidence for the court to find otherwise.

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[12] As for the allegation of miswiring, the learned trial judge expressed the view that Ichi-Ban had confused the issue of tampering, found on 21 September 2010, with the issue of miswiring, found on 13 September 2011. See the following passages in the judgment:

> (36) It is very clear that the defendant has understood that during the shifting of the meter the S1 and S2 wiring in the meter was inadvertently reversed.
>
> (37) What PW1 found was a link in the testimonial block that was connected and after it was opened the meter was back to normal.
>
> (38) There was nothing wrong with the meter after PW1 put it back in order and the team left it after the inspection. The miswiring only occurred when the meter was shifted.
>
> (39) These are two different issues and the defendant is confusing them.

OUR DECISION

[13] This appeal was not directly concerned with the question whether there had to be a conviction before there could be a claim for loss of revenue under s 38. The memorandum of appeal was not pursued on this basis, but more on the basis that on the pleadings TNB had alleged that Ichi-Ban had tampered with the metering equipment, and as such TNB had to prove this allegation before it could succeed in its claim for loss of revenue. According to the grounds, as disclosed in the memorandum of appeal, the burden of proof placed on TNB should have been proof beyond a reasonable doubt, and the learned judge had failed to so decide. See paras 3 and 4 of the memorandum of appeal:

> (3) Yang Arif yang Bijaksana telah terkhilaf dari segi undang-undang dan/atau fakta apabila gagal mengambil kira keterangan yang berkenaan dan memutuskan bahawa Responden telah melepaskan beban bukti untuk menunjukkan bahawa Responden telah mengalami kerugian sebanyak RM1,065,318.73.
>
> (4) Yang Arif Yang Bijaksana telah terkhilafdari segi undang-undang apabila gagal untuk memutuskan bahawa standard beban pembuktian yang terpakai adalah melampaui keraguan yang munasabah.

[14] It was therefore, strictly speaking, unnecessary for us to come to a finding on the first mentioned issue. Nevertheless, we were of the view that given the Federal Court decision in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd*, the legal position is clear. Although this Federal Court case concerned an issue of disconnection of electricity supply and in the context of a judicial review application, the same principles should apply, in our view, to a case involving a claim for loss of revenue under s 38(3). There is no legal requirement for there to be a prosecution and conviction first before a claim for loss of revenue is pursued. To this extent, we were in agreement with the finding of the learned trial judge, and disagreed with the other line of cases which

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required a prior prosecution and conviction, such as *Tenaga Nasional Bhd v Takatronics (M) Sdn Bhd* [2010] MLJU 1727; [2010] 1 LNS 1559 and *Tenaga Nasional Bhd v Ee-Lian Plastic Industries (M) Sdn Bhd* [2013] 8 MLJ 683; [2013] 2 CLJ 697. To quote the Federal Court in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd*:

> [7] At the Court of Appeal the appellant's appeal was dismissed on the ground that the relationship between the appellant and the respondent was purely commercial or contractual. As the relationship came within an environment regulated by private law it was not open to the appellant to challenge the respondent's decision by judicial review, which was a public law remedy. In dismissing the appellant's appeal, the Court of Appeal relied on *Claybricks & Tiles Sdn Bhd v Tenaga Nasional Bhd* [2007] 1 MLJ 217; [2006] 4 CLJ 892. This case relates to an Erinford injunction application to prevent the TNB from disconnecting the supply of electricity to the plaintiff's premises. Zulkefli Ahmad Makinudin JCA (as he was then) when dismissing the appeal remarked:
>
> > TNB's s 38 notice to disconnect the electricity supply for offences enumerated in s 7 need not prove the offences in court. The reason is that, any purported act to review such act will defeat the swift enforcement under the Act where electricity supply needs to be severed immediately to avoid further illegal usage by the perpetrator. The nature of the act taken by TNB arose from a commercial obligation on the part of the consumer rather than TNB's obligation under public law.
>
> [8] Zulkefli Ahmad Makinudin JCA also elaborated that s 38(1) of the Act was enacted to give effective powers to TNB to instantly prevent any offence that may be committed and not to be left unattended or unabated. It provided specifically for the preservation of TNB's interest and empowers TNB to act expeditiously, thereby preventing misuse such as theft of electricity supplied by TNB.

[15] It was apparent to us that the Federal Court approved the reasoning of the Court of Appeal in *Claybricks & Tiles Sdn Bhd v Tenaga Nasional Bhd*.

[16] More recently, another panel of the Court of Appeal has reaffirmed the correct position in *Sumbang Projeks Sdn Bhd v Tenaga Nasional Bhd* since reported in [2014] 4 CLJ 323.

[17] Although we agreed with the finding of the learned judge on the first mentioned issue on there being no legal requirement for a prior prosecution and conviction under s 37 before a claim for loss of revenue could be brought under s 38, we nevertheless allowed the appeal after hearing submissions and considering the totality of the pleaded case and the evidence on record, as against the findings of the learned judge. We were of the considered view that there was a non-direction and misdirection by the learned judge on the facts and the law, although we could not agree with the contention by counsel for Ichi-Ban that the standard of proof for the alleged tampering of the metering equipment had to be proof beyond reasonable doubt. In our view, even on the

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standard of balance of probabilities, TNB had failed to prove the alleged offence of tampering by Ichi-Ban, as pleaded by TNB, and further, to support and prove the quantum of damages. We could not agree with the broad finding that irrespective of how the case was pleaded, a s 38 claim could be supported as being premised on the principle of unjust enrichment simpliciter. We could not agree that there was no requirement to prove mens rea in all situations falling under a s 38 claim. Much would depend, in our view, on how the case was pleaded and the evidence led both on the issues of liability and quantum of damages.

[18] We therefore allowed Ichi-Ban's appeal and set aside the decision of the High Court with costs of RM50,000 here and below, to be paid by TNB as respondent. The deposit was ordered to be refunded to Ichi-Ban as appellant.

[19] The full reasons for allowing the appeal are addressed further below, after addressing and evaluating the respective submissions of the parties.

THE APPELLANT'S SUBMISSIONS IN THE APPEAL

[20] Ichi-Ban's appeal was premised on two points. These were related to whether TNB had discharged its burden of proof in relation to the alleged tampering and the special damages amounting to RM1,065,318.73 as pleaded. The written submission of Ichi-Ban stated two points in the following terms:

> Has the respondent discharged its burden of proof and proved the fol lowing:
>
> (a) The appellant has tampered with the meter in its premise from December 2006 to September 2010; and
>
> (b) If the respondent has succeeded in proving (a) above, the respondents suffered special damages amounting to RM 1,065,318.73 as pleaded in its statement of claim?

[21] In this regard, the High Court decision was said to be based on 'manifest error of finding of facts in interpretation of the Electricity Supply Act 1990', and that warranted the intervention of this court.

[22] Counsel submitted that TNB had expressly pleaded a 'tampering' which amounted to an offence under s 37. Paragraph 9 of the statement of claim, for instance, referred to 'terdapat bukti-bukti yang secara munasabah memutuskan bahawa suatu kesalahan di bawah Seksyen 37(1) dan/atau Seksyen 37(3) dan/atau 37(14) Akta Bekalan Elektrik 1990 telah dilakukan pada pepasangan meter/meter milik Plaintif di premis Defendan ...' Counsel referred to PWTs evidence which suggested Ichi-Ban could not have accessed the meter since it was housed in a locked metal cage, which had a padlock. The

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padlock had to be forcibly cut to access the metal cage. The witness could not be sure whether TNB installed the metal cage and padlocked it. This was argued to be illogical, as follows:

> Although under cross-examination SP1 answered that he did not know who put up the meter cage in the Appellant's premises ... the inescapable conclusion to be drawn would be it was the Respondent who put up a cage covering and locking the meter in order to prevent tampering. It would be absolutely illogical that the Respondent would allow the Appellant to put up and lock its own cage at the meter where the Respondent would have no access to the meter. (para 18 of the appellant's written submission)

[23] The evidence also suggested that TNB had a key for the padlock but it could open it.

[24] On the matter of fake seal bits (pleaded as another proof of tampering), the witness could not again testify for certain that these were fakes, since his conclusion was drawn merely from a visual assessment. There was no technical testing done. The witness could not be sure whether the alleged fake seal bits were installed by Ichi-Ban.

[25] As regards the evidence of 'miswiring', Ichi-Ban contested the learned judge's finding that this was a separate issue and Ichi-Ban allegedly was confusing the two issues of tampering, when the metering equipment was in the locked metal cage within Ichi-Ban's premises, and the issue of miswiring which occurred when the meter was moved from these premises to the TNB substation nearby. Counsel impressed upon us that the miswiring was discovered only on 13 September 2011 when, at all material times, the meter was under the care and supervision of TNB. TNB's witnesses were unable to confirm when the miswiring happened. The witnesses, who were called on this aspect of the case could not confirm the miswiring could not have happened earlier. They, however, admitted this was a mistake on the part of TNB. The evidence also confirmed the same meter was simply moved from Ichi-Ban's premises to the TNB substation. See the testimony of PW3 (Abdul Rahman) in cross-examination, which was highlighted to us in the course of submission:

> Q: Jawapan anda adalah selepas pemeriksaan pada 21 September 2010, pemeriksaan pemasangan meter-meter telah dialih dari meter ke pencawang pada 1 November 2010. Apa maknanya telah dialih meter ke pencawang? Adakah itu mengambil meter keluar dari premis anak guam saya?
>
> PW3: Ya, kita alih daripada premis ke dalam bilik pencawang TNB.

This point was forcefully argued by counsel in his written submission, as follows:

> "Based on the evidence led at trial, the miswiring could not have happened during the moving of the meter from inside of the premise to the substation because the

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> miswiring is INSIDE the meter itself (not outside the meter) where the Respondent's witness had confirmed that they merely moved from inside the premise to the substation meaning that everything in the meter was untouched. If that is the case, how could the miswiring happen during the moving of the meter? (paragraph 30 of the written submission)

[26] Turning to the issue of proving quantum of damages, counsel argued that the learned trial judge wrongly decided the losses were proven. The judge decided in TNB's favour despite the witness for TNB (PW2; Siti Tafizah bt Tajuldin) admitting at trial that she based her calculation on an estimation. On the one hand, the error detected when the meter was inspected showed a recording error of 36.11%, but in calculating the damages suffered by TNB, this figure was not used. Instead, an 'average' was used, calculated between the periods December 2006 to September 2010. December 2006 was used as a starting point because of an alleged drastic drop in kwh recorded for that month, despite the evidence revealing that for the month of December 2006 the number of days billed was much less, ie 26 days compared with 37 days in the preceding month. At para 35(e) of the written submission, it was argued thus:

> As demonstrated at trial, SP2 also admitted that she did not take into account the number of days in arriving to her calculation. It is important that as shown in the calculation ..., the number of days billed in November 2006 is 37 whereas the number of days billed in December is only 26. In fact, SP2 agreed to the counsel's suggestion at trial that the drastic drop was due to the 11 days difference between November 2006 and December 2006.

[27] This aspect of the evidence, according to Ichi-Ban's argument, was not properly addressed by the learned judge.

[28] It was therefore advanced forcefully in conclusion thus:

> It is abundantly clear from the grounds of judgment that the learned trial judge had made certain errors in the finding of facts and had failed to appreciate the relevant law, ie law on proving special damages.
>
> Most importantly, the learned trial judge had allowed the Respondent's claim even though its witnesses had testified at trial that the so called 'sudden drop' was merely based on guess work and the losses the Respondent claims to have suffered are merely estimation ...

THE RESPONDENT'S SUBMISSIONS

[29] On TNB's part, the arguments were principally premised on the strict wording of s 38(1), (3) and (4) of the ESA. Emphasising that all that was required under subs (1) was for any person employed by the licensee (TNB) to find 'upon any premise' evidence which 'in his opinion' proves that 'an offence

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has been committed' under s 37(1), (3) or (14). TNB submitted there was no requirement to prove mens rea. What was required was to prove a 'state of affairs' which in the opinion of that person, proved that an offence had been committed. There was no error on the part of the trial judge in this regard since the learned judge had found TNB had met the requirements of s 38, and was making a claim for loss of revenue.

[30] Further, and consistent with s 38(4), the burden of proof to disprove the written statement of the amount to be paid for loss of revenue lay on Inchi-Ban. TNB agreed with the finding of the learned judge that Ichi-Ban had not rebutted the presumption of prima facie evidence under s 38(4) with acceptable evidence. Ichi-Ban failed to produce the production records and accounts to show otherwise.

[31] As for the standard of proof required to prove both the commission of the offence and the loss, TNB argued it should be on the balance of probabilities. *JW Stupple v Royal Insurance Co Ltd* [1970] 3 All ER 230 was cited as authority. On the absence of a requirement for mens rea to be established, TNB's written submission stated:

> We submit that 'committed' in s 38(3) ESA is to be understood as meaning that an act has been perpetrated, ie the actus reus of the offence is proven; there is no requirement for the mens rea to be shown ...

[32] To support its argument, TNB relied on the principles established in the English case of *R v London Borough of Haverling* [2002] EWCA Crim 2558, which was, strictly speaking, an appeal in a trade mark infringement matter, but the English Court of Appeal laid down some general principles on statute being able to shift the legal/persuasive burden to the defendant to rebut a statutory presumption on a balance of probabilities, as well being able statutorily to dispense with proof of mens rea or dishonesty.

ANALYSIS

[33] As noted earlier in this judgment, TNB had pleaded there existed 'tampering' to the meter. Inchi-Ban contended TNB in fact pleaded it was Ichi-Ban who had tampered with the meter when it was located at Ichi-Ban's premises. On the pleadings, and on the evidence as led by TNB, we were of the view that TNB's case rested on this allegation of tampering by Ichi-Ban, for which Ichi-Ban had to pay for the resultant loss of revenue. With respect, we found there was no proper assessment of the pleadings and the evidence as led by the High Court. We could not accept the unqualified proposition that the claim under s 38 is grounded on unjust enrichment perse. The statutory context makes it clear that there has to be 'evidence' that some 'offence' has been 'committed', although s 38(1) states a low threshold of proof, ie the

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evidence in proof is said to be sufficient 'in the opinion' of the person in the employment of TNB who finds the evidence of tampering . Given the statutory formula, we could not therefore agree with the position adopted by Ichi-Ban that it must be proven beyond reasonable doubt that it committed the tampering. The distinction between prosecution and conviction of an offence under s 37 and a civil claim for loss of revenue under s 38 arising from the 'commission' of an offence under s 37, as laid down by the line of cases applying *Claybricks & Tiles Sdn Bhd v Tenaga Nasional Bhd*, will be subverted if Ichi-Ban's argument is accepted. Proof of the commission should more properly be on the lower standard of proof on a balance of probabilities, which is the accepted standard in civil cases even where proof of a criminal act is in issue, except where fraud is alleged. Nevertheless, even on this lower threshold, we did not find the claim for loss of revenue proven. In particular, there was insufficient attention directed by the High Court to the fact of 'miswiring'. It was accepted that the miswiring was done by TNB itself. It was crucial to determine when the miswiring happened — was it before or after the meter was moved from Ichi-Ban's premises to the TNB substation? We did not find the evidence overwhelmingly in favour of TNB. Even TNB's witnesses could not be sure, and indeed even conceded at one point that it was a mere matter of moving the meter from within the premises to outside it. In our opinion, it could not be proven on the balance of probabilities that the miswiring occurred after the detection of the alleged tampering, namely after the meter was moved from Ichi-Ban's premises to the TNB substation. Further, we believed the High Court failed to appreciate the critical significance of this issue by describing the miswiring and tampering issues as two different issues and Ichi-Ban, as the defendant, was allegedly confusing them.

[34] On the other issues of the seal bits being forged, and the manipulation of the metal case housing the metering equipment, the evidence was likewise far from satisfactory. The probabilities, in our opinion, did not show tampering by Ichi-Ban, or any other person for that matter. The evidence provided by TNB was too uncertain and inconclusive.

[35] In regard to the question of damages, we found the arguments advanced by Ichi-Ban convincing. Again, this was a matter of whether sufficient evidence was adduced to rebut the prima facie presumption accorded under statute, namely s 38(4)(b). Ultimately, it was reduced to the veracity of the evidence relied on by TNB's witness (PW2) and her calculation on the basis of an average and an 'assumption' that the sharp drop in reading occurred in December 2006, indicating some evidence of tampering. The relevant readings appeared on pp 120 –121 of the appeal record, Vol 2(1), Part B & C. We considered this document ('Pengiraan Bil Kebelakangan') in some detail. We found it difficult to support the witness's calculation on the basis periods chosen by her. We tended to agree with the submission by Ichi-Ban in this

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regard that the averaging was more on the basis of a 'guess'. There were only 26 billable days in December, as opposed to 37 days for the preceding month of November. We looked at the structure of previous monthly billing too, and as far as 2004, the billable amounts reflected drops as well as increases over time. In our opinion, Ichi-Ban had succeeded in rebutting the prima facie presumption of loss of revenue, despite not producing the production records and the accounts.

[36] Whilst the claim under s 38 was for loss of revenue as opposed to a prosecution and conviction for the offence of tampering, the ultimate burden rested still on the plaintiff (TNB) to prove both liability and, assuming liability was established, to prove the quantum of the loss of revenue. The ESA provisions provided assistance and aid to TNB to prove both these elements, but, with respect, ultimately success or failure must still rest on the state of the pleadings and the quality of the evidence presented by TNB. In our view, there were serious shortcomings in that quality of evidence produced at trial.

CONCLUSION AND ORDERS

[37] For the reasons stated above, we were of the unanimous opinion that the appeal should be allowed. As earlier stated in our grounds, we therefore allowed Ichi-Ban's appeal and set aside the decision of the High Court with costs of RM50,000.00 here and below, to be paid by TNB as respondent. We ordered the deposit to be refunded to Ichi-Ban as appellant.

Appeal allowed and the High Court's decision set aside.

Reported by Ashok Kumar